

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* J. B. ZAHRAIE, Minor.

UNPUBLISHED

April 18, 2017

No. 335492

Tuscola Circuit Court

Family Division

LC No. 07-009377-NA

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Before: SAWYER, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court order terminating his parental rights to the minor child, JZ, under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), (ii) (other conditions exist that cause the child to come within the court's jurisdiction), (g) (failure to provide proper care or custody), and (h) (child would be deprived of normal home for more than two years because of parent's incarceration).<sup>1</sup> We affirm.

I. FACTUAL BACKGROUND

In April 2007, petitioner, the Department of Health and Human Services ("DHHS"),<sup>2</sup> filed a petition requesting the removal of JZ's brother, EZ, from respondents' care. The petition asked the court to exercise jurisdiction over EZ pursuant to MCL 712A.2(b) because (1) EZ had severe autism and related behavioral problems; (2) respondent would be incarcerated for 270 days due to his conviction of "tampering with evidence, tobacco tax violation[,] and delivering tobacco to a minor"; and (3) respondents had another autistic child in the home, and respondent-mother was unable to care for both children on her own in light of EZ's behavioral issues. This petition initiated a series of child protective proceedings concerning EZ. Ultimately, the parties entered into a stipulation to return the child to respondent, and the trial court entered an order granting the request to terminate the court's jurisdiction over the child.

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<sup>1</sup> JZ's mother released her parental rights in November 2015, and she is not a party to this appeal. Thus, we will refer to respondent-father as "respondent" in this opinion. Where relevant, we will refer to JZ's mother as "respondent-mother" and both parents jointly as "respondents."

<sup>2</sup> References to DHHS include its predecessor, the Department of Human Services ("DHS").

In June 2013, petitioner filed a petition requesting the removal of JZ and EZ from respondents' care, alleging that it was contrary to the children's welfare to remain in respondents' home. Specifically, the petition alleged that (1) respondent had sole physical and legal custody of JZ; (2) JZ and EZ were "vulnerable minors in that they have both been diagnosed with Autism Spectrum Disorder, and have special and extensive needs"; (3) respondent-mother admitted that she continued to reside with respondent despite the fact that he was "verbally, mentally, and emotionally abusive towards her"; (4) "[i]llegal substance manufacturing was occurring in the apartment in which the minor children reside"; and (5) "[t]he kitchen pantry was found to be filled with plant materials, acetone, syringes, and recipes for the manufacturing of illegal substances. There was no lock to prevent entry by either minor child." Moreover, the petition alleged, with regard to a raid performed at respondent's store, that (1) "[a] large, curved knife was found under the counter where the minor, special needs children did have easy access"; (2) "[EZ and JZ] were observed and were present at the store during the law enforcement search of the business after being dropped off by the school bus"; and (3) "[EZ and JZ] were present at the store when sales of the illegal substances occurred." The petition also incorporated by reference the entire court file, including that concerning the previous child protective proceedings involving the family. An amended petition was filed in October 2013, which provided details regarding the child protective proceedings in 2007 and additional allegations regarding respondent-mother. Both petitions were authorized by the trial court.

Initially, after respondent-mother entered a plea of admission to some of the allegations in the amended petition, the trial court exercised jurisdiction over the entire family pursuant to the one-parent doctrine. Later, the trial court adjudicated respondent separately after the Michigan Supreme Court overturned the one-parent doctrine in *In re Sanders*, 495 Mich 394, 403; 852 NW2d 524 (2014).

Between June 2013 and early 2014, the children were placed in residential treatment facilities. Respondent was ordered to comply with the case service plan, but he largely failed to comply with the ordered services.

In March 2014, respondent was convicted of several offenses related to the unlawful manufacture, possession, and delivery of a controlled substance, the maintenance of a drug house, and racketeering. In May 2014, he was sentenced, as a third habitual offender, to 15 to 40 years for his racketeering conviction and shorter sentences for his other convictions. Apart from identifying his brother as a potential relative placement, respondent never mentioned that he had developed a care plan for his children while he was in custody.

At a permanency planning hearing in May 2014, the DHHS foster care manager recommended termination of respondent's parental rights to JZ in light of his incarceration.<sup>3</sup> However, petitioner had not ruled out the possibility that JZ could be placed in a guardianship with respondent's brother. The foster care manager confirmed that DHHS would continue to investigate the prospect of a guardianship, despite its concerns regarding the financial needs of

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<sup>3</sup> For reasons not relevant to this appeal, the trial court terminated its jurisdiction over EZ in June 2014.

respondent's brother and the availability of funding for a guardianship under the circumstances. After the hearing, the trial court ordered that respondent shall comply with his case service plan and that his parenting time with JZ was suspended.<sup>4</sup>

In October 2014, petitioner filed an amended petition. The petition included most of the same allegations concerning respondent as the October 2013 petition. However, the October 2014 petition included new allegations regarding respondent's convictions and sentences.

In December 2014, the trial court entered an order of adjudication concerning respondent based on respondent's plea of admission to several of the allegations in the petition.<sup>5</sup> Between January 2015 and July 2015, the trial court entered several orders holding, *inter alia*, that respondent was required to comply with and benefit from the case service plan, and that respondent's in-person parenting time with JZ remained suspended, although respondent was permitted to have letter contact with JZ through DHHS, or telephone contact with JZ if respondent paid for it. During that time frame, the permanency planning goal was changed to adoption after petitioner's efforts to finalize a guardianship for JZ with respondent's brother were unsuccessful.

In November 2015, DHHS filed a petition requesting termination of respondent's parental rights to JZ under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (h). Specifically, the petition alleged that the following circumstances demonstrated that the conditions that led to adjudication continue to exist, and there is no likelihood that they will be rectified within a reasonable time: (1) CPS previously removed the children from respondents' care in 2007; (2) respondents were offered a variety of services, but failed to participate in, or benefit from, those services; (3) before his incarceration, respondent completed a psychological evaluation and an initial assessment for counseling services, and he participated in parenting time, but those services could not be continued during his imprisonment; (4) "[respondent] refused to sign the case service plan throughout the history of the DHHS case"; (5) in March 2014, respondent was convicted of several drug-related charges; (6) respondent had not seen JZ since approximately March 2014; (7) "[respondent's] earliest release date . . . is March 2029," and "[h]is maximum discharge date is set for March 2054"; and (8) "[respondent] has complied with virtually none of the [c]ourt-[o]rdered case service plan and/or has not shown benefit since June 2013 when his child came into care."

In January 2016, respondent filed a motion for the appointment of a guardian for JZ, stating that he would agree to a guardianship arrangement if his brother were JZ's guardian. He also contended that there was no guarantee that JZ would be adopted by his brother if the court

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<sup>4</sup> Respondent's parenting time remained suspended throughout the rest of the child protective proceedings due to his incarceration. However, the trial court ultimately allowed other types of contact.

<sup>5</sup> In May 2015, a second order of adjudication was entered with regard to respondent. It stated that a hearing had been held in December 2014, the date of the original order of adjudication, and made the same findings with regard to respondent's plea.

granted the petition to terminate his parental rights. Accordingly, respondent requested that the trial court approve respondent's brother as JZ's guardian, or, alternatively, allow additional time for the filing of paperwork related to the approval of a guardianship.

In response, petitioner argued that the trial court should deny respondent's motion. While it agreed that a placement with respondent's brother was in JZ's best interests, it expressed doubt as to whether respondent's brother would be willing to become JZ's guardian, as it was impossible to assure respondent's brother of the "certain financial requirements and services [that] would need to be provided for him to be comfortable" accepting a guardianship, based on his conversations with DHHS employees. Petitioner also explained why it believed that termination and adoption were in JZ's best interests.

The trial court held a two-day hearing on the termination petition in January 2016. Petitioner presented testimony from Kevin Zaborney, a CPS worker, who was first assigned in April 2013 to the family's ongoing CPS case; Krista Mackowiak, a DHHS foster care supervisor; and Corina O'Dell, a DHHS foster care and juvenile justice specialist, who was JZ's caseworker. Respondent presented testimony from his brother and respondent-mother. At the end of the hearing, respondent moved to dismiss the termination petition because JZ, who was 15 years old at the time of the hearing, was not served with written notice of the termination hearing pursuant to MCL 712A.19b(2)(h) (requiring service of written notice not less than 14 days before a termination hearing if the child is 11 years old or older). The trial court granted respondent's motion and dismissed the petition.

In February 2016, petitioner filed an amended petition requesting termination of respondent's parental rights that was virtually identical to the termination petition filed in November 2015. A new termination hearing was held in September 2016. The trial court took judicial notice of the file, including the evidence admitted at the termination hearings in January 2016. The trial court also took judicial notice of respondent's May 2014 judgment of sentence. Petitioner presented testimony from respondent's brother and Amanda Bishop, a foster care and private agency monitor supervisor for DHHS. Respondent testified on his own behalf.

In October 2016, the trial court issued an eight-page opinion, concluding that a statutory basis for termination under MCL 712A.19b(3)(c)(i), (ii), (g), and (h) had been established by clear and convincing evidence, and that termination of respondent's parental rights was in the best interests of JZ. Consistent with its written opinion, an order was entered terminating respondent's parental rights on October 11, 2016.

## II. STANDARD OF REVIEW AND APPLICABLE LAW

Pursuant to MCL 712A.19b(5), "[t]he trial court must order the parent's rights terminated if the [petitioner] has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the child[s] best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014) (footnotes omitted). We review for clear error a trial court's best-interest determination. *Id.*, citing MCR 3.977(K).

When it makes a best-interest determination, the trial court should weigh all available evidence, *id.*, and the trial court's focus should be on the child rather than the parent, *In re Moss*, 301 Mich App 76, 86-87; 836 NW2d 182 (2013).

To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*In re White*, 303 Mich App at 713-714 (footnotes omitted); see also *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).]

Other considerations include the length of time the child has been in foster care or placed with relatives, and the likelihood that "the child could be returned to her parents' home within the foreseeable future, if at all." See *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012).

### III. ANALYSIS

As the trial court noted, the record shows, by much more than a mere preponderance of the evidence, that termination of respondent's parental rights was in the best interests of JZ. The trial court's reasoning considered a wide variety of factors and is strongly supported by the record.

JZ is autistic and has "extreme needs" that require extensive care and services on a daily basis. He is unable to independently address his basic needs in day-to-day life, such as preparing his own food and bathing himself, and he needs virtually constant supervision. He also has limited verbal communication abilities. JZ will struggle with these limitations for the rest of his life, and it is highly unlikely that he will be able to live independently or support himself in the future.

At the time of the second termination hearing in September 2016, JZ had been removed from respondent's care since June 2013. Before being placed with respondent's brother, JZ stayed in two residential care facilities. While he was there, he exhibited significant behavioral issues, including demonstrations of hostility and aggression—sometimes resulting in physical harm—toward others as well as himself.<sup>6</sup> He also lost a significant amount of weight and had limited interaction with other people.

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<sup>6</sup> It is noteworthy that respondent testified that he did not think that he should be concerned about JZ's anger or acts of slapping other individuals, including respondent and another student at JZ's previous school. Although JZ is a teenager, respondent rationalized, "[H]e's a baby. He's autistic. He doesn't comprehend." He also stated, "He doesn't function properly. He just slap

It is undisputed that JZ's overall well-being improved significantly after he was placed in the home of respondent's brother, and that respondent's brother is a skilled and appropriate caregiver for JZ. The brother has experience caring for autistic children, as he has cared for two adopted sons with autism for approximately 15 years.

With the help of caregivers during the workday, respondent's brother provided for all of JZ's needs, assisted him with his daily tasks, and provided 24-hour supervision. The parties agreed that all of JZ's basic needs, as well as his medical and educational needs, were being met in the brother's household. The witnesses unanimously testified that JZ seemed "very happy," healthy, and "[i]n good spirits" in the home of respondent's brother.

The testimony plainly demonstrates that JZ had established a bond with respondent's brother and his autistic sons. Furthermore, JZ had established a routine in the home, which is especially important for an autistic child, and he appeared to be comfortable there.

JZ exhibited increased interpersonal interaction, with his caregivers as well as other people, after being placed with respondent's brother, and he began to perform new tasks, such as cleaning up the table after eating a meal. JZ had been largely nonverbal, but after being placed with respondent's brother, he would smile, talk more, and respond to the brother's directives. A caseworker testified that JZ would interact with other people when prompted by respondent's brother, unlike during his previous placements.

JZ was receiving special education services at his nearby public high school and doing "excellent" in that program. Respondent's brother also was attempting to get JZ out of the house and into the community through additional activities.

JZ's health was "good," he had not been injured while living in the home of respondent's brother, and the brother ensured that JZ went to routine check-up appointments every six months. JZ's behavioral issues significantly improved while living in the home, especially after respondent's brother took JZ to a neurologist, who found an effective medication for JZ.<sup>7</sup>

Respondent's brother consistently testified that he was willing to adopt JZ, to care for him as his own son, and to support him after he turns 18, as long as he continued to receive caregiving services. The caseworkers also unanimously testified that continued placement with respondent's brother, through the termination of respondent's parental rights and adoption by

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me too. That's my baby. It's just anger, frustration. He cannot express his feelings. He want some food or something, that's the way they talk."

<sup>7</sup> Although JZ was prescribed psychotropic medication without respondent's authorization before respondent's parental rights were terminated, the witnesses testified that the medication alleviated many of JZ's behavioral issues, including JZ's tendency to physically hurt himself; helped him to feel happier and calmer; and improved his sleeplessness. Respondent fervently contested JZ's need for psychotropic medications throughout the proceedings, but a doctor and caseworker indicated that JZ needed to stay on the medication for his own safety, and respondent's brother did not observe any side effects or disadvantages to JZ staying on the medication.

respondent's brother, would provide the permanency, stability, and finality that JZ needs, especially in light of his autism. Moreover, respondent's brother was willing to continue to raise JZ in accordance with the Muslim religion and culture that he shared with respondent, which was the way that respondent's brother had raised his other two boys.

The record confirms that respondent refused to participate in most of the services offered before his incarceration—except for participating in parenting time, one psychological evaluation, one counseling session, and a few family team meetings—and he consistently refused to sign the parent-agency treatment plans prepared by petitioner. There is no evidence in the record that petitioner's concerns regarding respondent's emotional instability, aggressive and hostile manner of interpersonal communication, or pattern of criminal activity<sup>8</sup> were addressed during the pendency of this case, whether due to a lack of available services in the prison or a failure to participate in counseling or similar services during his incarceration.

Although respondent testified that he loves JZ and believed that maintaining a parental relationship would be in JZ's best interests, respondent had not seen JZ since March 2014. At the time of the termination proceedings, respondent was expected to be imprisoned until 2029, at which time JZ would be 29 years old.<sup>9</sup> While respondent likely shared a bond with JZ before his incarceration, especially in light of respondent's testimony that he was JZ's primary caregiver before JZ was removed, caseworkers confirmed the significant likelihood that this bond had been weakened by the separation. Undoubtedly, JZ's bond with respondent would continue to decrease given the *de minimis* communication between JZ and respondent, and JZ's extremely limited ability to communicate in writing or by phone due to his severe autism.

Throughout the course of the proceedings, respondent consistently took the position that the best placement for JZ was with his brother. However, his primary argument in the trial court, and his implicit argument on appeal, is that DHHS should have pursued a guardianship with his brother in lieu of termination, and that termination was not in JZ's best interests because money was the only reason why the permanency plan was changed from guardianship to adoption. He claims that "[t]his case is all about the \$5,200.00 per month that [respondent's brother] is receiving for the cost of care for [respondent's] son," and "[respondent's brother] only has [JZ] there because he is receiving the adoption subsidy of \$5,200."<sup>10</sup>

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<sup>8</sup> A DHHS caseworker confirmed that respondent's prior incarceration and CPS case in 2007 were concerning because it demonstrated a pattern of criminal activity and incarceration.

<sup>9</sup> Respondent has not successfully overturned his convictions on appeal.

<sup>10</sup> The crux of respondent's argument on appeal is as follows:

Arguably the petitioner met there [sic] burden, [respondent] is obviously in prison and cannot care for his son. However the Court erred on the termination being in [JZ's] best interest. This is a case of money and only money. [Respondent's] brother only has Jason there because he is receiving the adoption subsidy of \$5,200. Multiply that by three and he is receiving \$15,600.00 per month for three children. The uncle, per his testimony, will not keep [JZ] if there

Respondent's argument completely mischaracterizes the testimony below. The testimony provided by respondent's brother, as well as the testimony of the DHHS caseworkers involved in the case, clearly shows that respondent's brother was not seeking financial gain in caring for JZ, and that significant financial support was required in order for respondent's brother to provide for JZ's needs while continuing to provide for himself and his two other sons.<sup>11</sup> There is no indication in the record that respondent's brother personally benefited from those funds. One of the greatest expenses related to JZ's care was the cost of his home health care providers, and the testimony clearly demonstrated that these home health care providers were indispensable while JZ was placed in the household. Respondent's brother needed to continue working in order to have sufficient income to support himself and his other sons, and he would not be able to continue working without a home health aide to care for JZ while he was at work.

Respondent fails to acknowledge that the record shows that petitioner made significant efforts to establish a guardianship throughout the course of the proceedings, despite its ongoing concerns about the financial resources that would be available for respondent's brother if a guardianship were established. Consistent with its earlier concerns, DHHS ultimately determined that a guardianship was not feasible in this case, and would not benefit JZ, because the same level of financial support would not be available under such an arrangement. Under a guardianship, respondent's brother would receive between \$1,000 and \$1,200 *per month*, instead of the \$1,194.13 *per week* that he receives while JZ is in school. The significant decrease in funding available under a guardianship was largely due to the fact that respondent's brother was not a licensed foster parent and was not willing to become one, meaning that DHHS could not pursue a subsidized guardianship in this case.<sup>12</sup> He testified that he only would be interested in serving as JZ's guardian if JZ received sufficient services, and that he would be unable to serve as JZ's guardian if there was insufficient funding, especially given the fact that JZ needs 24-hour care and the fact that respondent's brother cares for two other autistic boys.

The DHHS caseworkers and supervisors testified unequivocally, based on their knowledge and experience, that even though there was no guarantee, it was very likely that funding comparable to the amount that respondent's brother was currently receiving would be available if he adopted JZ. The caseworkers also consistently testified that even though there was, again, no guarantee, there was a very high likelihood that respondent's brother would be able to adopt JZ successfully if respondent's rights were terminated, and that there was a very

is no subsidy. How is that in [JZ's] best interest? Per the uncle's testimony he is working and it is caregivers taking care of Jason, how is that in his best interest? Terminating a parent's rights based upon money is against public policy and should not stand.

<sup>11</sup> Contrary to respondent's claim that his brother receives \$15,600 per month for the three children, the brother testified that he only received an adoption subsidy of "\$3,000.00 a month plus caregivers" until his other children were 19 years old. After turning 19, the adult children only receive "Social Security plus caregivers" provided by "[m]ental health in Oakland County . . . ."

<sup>12</sup> Respondent's brother was a licensed foster caregiver in the past and explained that he was not interested in pursuing foster care in the future.



small likelihood that someone other than respondent's brother would be willing to adopt JZ. DHHS personnel also confirmed that it was highly unlikely for a child to be moved from a preadoptive placement after parental rights were terminated.

Respondent asks how this arrangement could be in JZ's best interests when his brother "is working and it is caregivers taking care of [JZ]." As previously discussed at length, it is clear that the brother must continue working in order to support himself and his family, and that he spends a significant amount of time personally caring for and working with JZ. Most notably, given the lack of other potential foster families, JZ would likely be placed in an institution if respondent's brother were not willing to care for him. If that occurred, JZ would spend years in a residential facility, away from family members, before respondent was released from prison. Especially considering (1) the undisputed testimony that the financial resources and services available to JZ would be much more limited if JZ were placed in a guardianship with respondent's brother, (2) JZ's heightened need for permanency and stability due to his autism, (3) the clear benefits of the brother's household, (4) the brother's intent to adopt JZ, and (5) the numerous concerns previously discussed concerning respondent's conduct and emotional stability, there is no basis for concluding that allowing JZ to wait for years in a guardianship with inadequate resources would be more in line with JZ's best interests than terminating respondent's parental rights. A trial court is not required to consider the establishment of a guardianship when it is in the child's best interests to terminate the respondent's parental rights. See MCL 712A.19a(7).

The trial court did not clearly err in concluding that termination of respondent's parental rights was in JZ's best interests.

#### IV. CONCLUSION

Respondent has failed to demonstrate that the trial court's best-interest determination was clearly erroneous.

Affirmed.

/s/ David H. Sawyer  
/s/ Henry William Saad  
/s/ Michael J. Riordan